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No. 64

In the
Supreme Court of the United States
OCTOBER TERM, 1967

UNITED ARTISTS CORPORATION,
Appellant,

v.

CITY OF DALLAS,
Appellee.

APPELLEE'S BRIEF IN ANSWER TO BRIEF SUBMITTED BY AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AND TEXAS CIVIL LIBERTIES UNION, AMICI CURIAE

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The Dallas Motion Picture Classification Ordinance is not a form of prior censorship as that term has been used and defined by the Supreme Court. This Appellee agrees that in the final analysis a child's parent should decide what their children should see or read. The Dallas Ordinance, when properly interpreted and understood, is basically an aid for parents. The Ordinance simply requires that those movies containing material which is harmful for children shall be advertised as "not suitable for young persons". Of course, this Appellee does not believe that a producer or

artist is so dominated by the profit motive, i.e., primarly concerned with taking money from children fifteen (15) years old and under, that he would prostitute his principles and cease to create as his creative ability dictated.

QUESTION PRESENTED

Whether the Dallas Motion Picture Classification Ordinance, City of Dallas Ordinance No. 11284, which deals with the classification of adult motion pictures as "not suitable for young persons", is proper legislation within the terms of the First Amendment to the United States Constitution.

ARGUMENT

I.

The Dallas Motion Picture Classification Ordinance does not violate the First and Fourteenth Amendments because it follows the law as laid down by the United States Supreme Court.

Three short years ago in 1964, the United States Supreme Court set forth the policy and laid the foundation for legislation, such as the Dallas Motion Picture Classification Ordinance, in its opinion in *Jacobellis v. Ohio,* 378 U.S. 184. Although the case dealt with whether or not the motion picture "The Lovers" was obscene, this Court in that case stated that it recognized the problem of disseminating harm-

ful material to children and went on to recommend a solution. The Court stated at page 195:

> "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. * * * State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination. * * *"

In the *Jacobellis* case the Court stated that the State's interest in its children would not justify total suppression of material harmful to children so as to "reduce the adult population * * * to reading only what is fit for children." The Court here was following its earlier decision in *Butler v. Michigan*, 352 U.S. 380. It is patently clear that the Dallas Classification Ordinance avoids this pitfall because it does not totally suppress, prohibit or attempt to alter in any fashion any motion picture. Quite simply, the Dallas Ordinance requires that adult entertainment be labeled as such.

Amici Curiae based a large portion of their brief upon a law comment (unsigned) appearing in 67 *Columbia Law Review* (1967). A portion of the quotations relied upon apparently are those comments of a writer whose background is unknown and whose expertise as to what a child will or will not accept, certainly cannot be evaluated. It is a well written article in many aspects, but Amici Curiae fail to point out to the Court that even in this article, which

attempts to show that there should be no classification insofar as children are concerned, there are admissions that the views of the writer may not be that of the Court:

> "One of the three attributes of obscenity, as the Supreme Court has defined it, is that it must appeal to the prurient interest; it seems reasonable to suppose that some material will have prurient appeal for children, though not for adults. This may be the basis for the Supreme Court dicta just summarized; in any event, these dicta make it probable that the Court will accept age classification censorship for obscenity. * * *" page 1157 (Footnotes omitted)

It also points out that the profit motive of the producer may be a far greater overriding factor than is the promulgation of a new idea in the abstract. This is evidenced by the statement that:

> "* * * Although exclusion of children from movies theoretically results in no total suppression of the content of the expression, age classification will force producers and exhibitors either to restrict the content of their films or to accept revenues potentially far below average, for minors constitute the largest group of film-goers in the country. * * *" page 1158 (Footnotes omitted)

This Appellee can find no Court or responsible authority, which would advance the idea or principle that children should be held to the same standard of maturity and reason as adults, and indeed not even the Appellants or Amici Curiae have attempted to do so.

It is respectfully urged that a proper understanding of the purpose of the First Amendment and the rights for which it was designed to protect reveals no improper con-

flict with the Dallas Motion Picture Classification Ordinance. The First Amendment was designed to protect a man's right to express his ideas, no matter how unpopular, by whatever means he chooses, including motion pictures. It should be remembered that this Classification Ordinance does not attempt to tamper with the work product of any writer, artist or producer. The Ordinance in no way interferes with the distribution of motion pictures. The Ordinance allows local exhibitors of motion pictures to exhibit any and all motion pictures; but the Ordinance does require that adult entertainment be labeled as such, and it attempts to regulate the conditions under which a child under the age of sixteen (16) years may view material found to be "not suitable for young persons".

Of course, this Court is well aware of the tremendous rise in recent years of juvenile delinquency and the rising crime rate, particularly crimes committed by this Nation's young people; it has appalled all persons who are honestly concerned with this Nation's well being. *(In re Gault*, 387 U.S. 1) Our leaders, both national and local, have again and again expressed deep concern and have urged responsible persons to seek solutions to this problem.

The City Council of the City of Dallas, after much investigation and deliberation, found that motion pictures had a definite effect on a child's behavior, and that many of today's motion pictures had a detrimental effect. It is admitted that motion pictures are not the only influences upon a child, but most authorities agree that motion pictures have a substantial effect on a child's behavior, as did

this Court in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, when this Court stated that motion pictures can possess a greater capacity for evil than other modes of expression.

Amici Curiae seem to contend that a child should properly be exposed to the same kinds of material and entertainment as adults, and the only possible conclusion that can be drawn from such a contention is that children have the same ability and maturity to judge and decide as adults. This thinking would be hard to reconcile with the many, many laws which make distinctions based on age, for example laws dealing with: obtaining a driving license, buying or selling liquor or other alcoholic beverages, child labor, the capacity to contract, voting, holding political office, responsibility for negligence, and certain crimes. The medical profession has determined that certain drugs may be taken by adults but not children. To the argument that the matters listed above deal with the physical well being of a child, this Appellee would strongly and sincerely argue that a child's mental well being is at least as important as his physical well being. Shall we protect a child's body and ignore his mind? Does the state have a responsibility for the child's mental well being?

The Amici Curiae state that only material which would be obscene to adults, as that term has been defined by this Court, should not be disseminated to children. The obscenity test as set forth by this Court from *Roth v. United States*, 354 U.S. 476, to *A Book, Etc. v. Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413, *Ginzberg v. United States*, 383 U.S. 463, and *Mishkin v. State of*

New York, 383 U.S. 502, vividly demonstrates an extremely hard test, and properly so. It would seem ludicrous to seriously contend that children should be freely exposed to all material except material which is so blatantly vile and worthless that it is excluded from adults. Amici Curiae fail to recognize that a motion picture, or other material, may have some redeeming social value that can be appreciated by an adult but which cannot be appreciated by a child, and is therefore of no value to him.

Although Amici Curiae do not agree with the principle of "variable obscenity", prior decisions of this Court and the lower Courts have indicated that this principle is proper. *Jacobellis v. Ohio, supra, Butler v. Michigan, supra, Ginzberg v. United States, supra, Mishkin v. State of New York, supra, Interstate Circuit, Inc., et al v. City of Dallas*, 366 Fed. 2d 590, *In Re Louisiana News Company*, 187 F. Supp. 241.

This Court has consistently recognized the valid State interest in its children's welfare, *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158. Juvenile crime and delinquency create a social problem which commands state concern. Many motion pictures misrepresent reality and portray anti-social behavior as if it were the accepted mode of conduct. Children without proper guidance can be, and have been, misled and improperly influenced by such presentations through the motion picture media. Many responsible producers, distributors and exhibitors of commercial motion pictures have themselves classified certain movies as "adults only" in Dallas and other cities through-

out the county.* They realize that certain films are adult entertainment and were intended as such, and they do not seek to exploit the children. It is extremely unfortunate that all movie producers are not as responsible.

It should be remembered that the Dallas Ordinance provides that any child may see any motion picture, but when viewing a motion picture that has been classified as "not suitable for young persons", the child must be accompanied by his parent or guardian. This provision is very important to the value of the Dallas Ordinance. If a parent feels his child is mature enough to receive social value from viewing an adult film, he may accompany his child, and the child will receive the benefit of parental guidance.

The "tangible and demonstrable evil" that Amici Curiae seek to find regarding this Classification Ordinance is simply the misrepresentation of accepted conduct presented so as to impress upon the young people that such portrayals are proper social behavior. Although we assume that most adults are mature enough to accept or reject these portrayals as they see fit, many, many young persons are impressed by such portrayals and are stimulated to imitate what they see because of the attractive manner of presentation.

It goes without question that juvenile delinquency is a social evil. The City Council of the City of Dallas deter-

* In some instances the contractual arrangements between the producer, distributor and exhibitor impose its own regulation, e.g., exhibitors throughout the United States were prohibited (by the producer) from allowing anyone under the age of 18 years to view such movies as "Who's Afraid of Virginia Woolf?" and "Ulysses". This is an obvious example that the movie industry itself feels that certain movies are not suitable for viewing by children.

mined that one of the contributing factors was the false impressions received through the motion picture media, and the Council sought a solution. The Dallas Motion Picture Classification Ordinance was its answer. It allows complete free expression and dissemination of material and ideas. It does not seek to curb anyone's creative thinking. It does seek to control the conditions under which a young person is exposed to adult entertainment, and as such, would offer some restraint to the exploitation of the young and immature.

Amici Curiae have no solution and propose none except to apply the same standards to a minor that they would to an adult insofar as the material content of movies is concerned. Even the movie industry itself has not gone this far. They have established certain movie houses where movies "for adults only" are shown. It is true that the burden of proof on the City is onerous. Because a problem is difficult, it should not deter the City from attempting a solution thereof, if public interest requires a solution. It is our feeling that this is such a problem. Once the germ of sexual perversion or criminal violence is ingrained in the young person's mind and then is repeated on many occasions with attractive packaging, it becomes a part of the many items which make up that individual's character. Maybe subsequent delinquencies or criminal tendencies cannot be directly contributed to the one factor, but if it, among other factors, comprises the bundle which causes that delinquency or criminal tendency, then the public should be concerned with it. Certainly the writers of the Constitution did not intend that

the State could not protect its young persons against such an invideous mental suggestive procedure.

II.

The Dallas Motion Picture Classification Ordinance is valid and sufficiently definite under constitutional requirements.

Amici Curiae argue that the Dallas Motion Picture Classification Ordinance is void because the standard for classifying motion pictures is too vague. The classification standard of the Dallas Ordinance, City of Dallas Ordinance No. 11284, is set out in Section 46A-1 (f), wherein the term "not suitable for young persons" is defined. (Amici Curia Brief, Appendix, Page 16).

To this argument this Appellee would simply request this Court to note that the language used in the Dallas Ordinance to define motion pictures, which are "not suitable for young persons", in most part is taken from opinions written by this Court. A good part of this definition tracks the Court's own definition of obscenity with the only modifications being those necessary to adopt that definition to classifying motion pictures for young persons.

If we would accept the argument of Amici Curiae, it would be impossible to have adequately sufficient standards for classification. This position is contrary to the Court's decision in *United States v. Petrillo*, 332 U.S. 1. It is obvious that Amici Curiae's assertion that the Classification Board is allowed to depend upon "whimsical opinion" is without

merit, and it is easily demonstrated by simply reading the definition of "not suitable for young persons".

Far from being adrift without any chart for its course, the Ordinance sets out the guide lines for each Board member to follow. It is not a matter of personal tastes or personal likes, but it is language that has been used by this Court on numerous occasions. It is incumbent upon the Board to interpret the Ordinance in the light of the decisions handed down by this Court. If the guide lines are hazy, the opportunity is now presented to this Court to make them clear and concise.

In addition to the Classification Board's judgment concerning a motion picture, the Motion Picture Exhibitor is entitled to a speedy judicial determination as to whether or not the particular movie in question is in fact "not suitable for young persons". If an exhibitor disagrees with the Classification Board, the City of Dallas has the burden of proving in a court of competent jurisdiction that the particular film is "not suitable for young persons". If the City of Dallas fails to perform this burden within ten (10) days, i.e., obtain said judicial determination, the motion picture may be shown without classification. It seems abundantly clear that a reasonable man, particularly one as well versed and intelligent as producers, distributors and exhibitors of motion pictures, would have little trouble understanding the classification standard.

It must be remembered that the Dallas Ordinance is not a censorship ordinance. It does not tamper with the work product of a creator of motion pictures. Censorship con-

notates either total suppression, prohibition of material or a deleting of a portion of the material. To urge that a film producer will not produce a film under the overriding influence of the Dallas Classification Standard, is to admit that the producer is more interested in obtaining profits from admission fees of children than in making a motion picture in accordance with the dictates of his ideas.

Amici Curiae have misunderstood the judicial review provided by the Dallas Classification Ordinance. The motion picture exhibitor is provided a speedy de novo judicial determination. If he wishes, he may have a jury. The Judge and/or jury makes an independent judgment as to whether or not the particular motion picture is in fact "not suitable for young persons". In this particular case, involving the motion picture "Viva Maria", in addition to the judicial determination by the District Judge, the Texas Court of Civil Appeals viewed the movie in its entirety and found that it was in fact "not suitable for young persons". It should also be remembered that this judicial hearing was a civil proceeding rather than criminal.

The Court should at all times keep in mind that the Dallas Ordinance provides first for the classification of the movie. This is a matter that involves the determination of the Board, which is a civil matter, and any court proceedings regarding a classification is also a civil matter. The burden of proof is completely upon the City to establish the classifi-

cation. It is only after the classification is established in the civil court that any criminal or misdemeanor action can actually be taken, and even this is of a minor nature, being that of a fine only. This means that the producer and exhibitor do not have to look to the classification standard in the Ordinance to determine whether or not there will be a misdemeanor violation. This is not a matter of vagueness—it is a matter of absolute knowledge on their part. This applies before any misdemeanor charge is filed.

Amici Curiae are incorrect in requesting that this Court reverse *convictions* in this case as it pertains to the City of Dallas and United Artists Corporation and Interstate Circuit, Inc., because, as stated above, this is not a criminal case.

This Appellee would urge the Court to balance the substantial public interest in protecting its young persons against the very minimal effect on the First Amendment. We would respectfully request that this Court weigh the public interest against the private interest of the movie industry as it has done in the past. *Breard v. Alexandria,* 341 U.S. 622; *American Communications Association v. Douds,* 339 U.S. 382; *Barenblatt v. United States,* 360 U.S. 109; *Wilkinson v. United States,* 365 U.S. 399; *Braden v. United States,* 365 U.S. 431; *Konigsberg v. State Bar of California,* 366 U.S. 36, and *Kovacs v. Cooper,* 336 U.S. 77.

III.

CONCLUSION

Based upon the foregoing reasons, Appellee prays that said judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, be affirmed.

Respectfully submitted,

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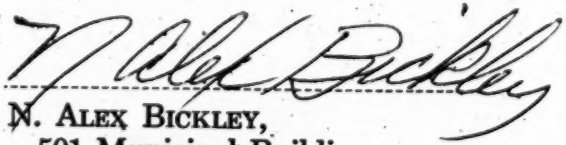
CERTIFICATE OF SERVICE

A copy of this brief in answer to the brief of Amici Curiae has been served upon Mr. Dan McElroy and Mr. Paul Carrington, attorneys for Appellant-Intervenor, United Artists Corporation, by delivering same to them in their offices located at 1900 Mercantile Dallas Building, Dallas, Texas, and to Mr. Grover Hartt, Jr., and Mr. Edwin Tobolowsky, attorneys for Appellant, Interstate Circuit, Inc., by delivering the same to them at their offices located at 3525 Southland Center, Dallas, Texas; and to Mr. Irwin Karp, 120 Broadway, New York, New York, 10005, Attorney for The Authors League of America, Inc., Amicus Curiae, by depositing same in the United States Mail; and to Mr. Osmond K. Frankel, 120 Broadway, New York, N. Y., 10005; Mr. Edward J. Ennis, 8 West 40th Street, New York, N. Y., 10018; Mr. Melvin L. Wulf and Mr. Alan H. Levine, 156 Fifth Avenue, New York, N. Y., 10010, and Mr. Fred O. Weldon, Jr., 1601 National Bankers Life Building, Dallas, Texas, 75201, Attorneys for Amici Curiae, The American Civil Liberties Union, New York Civil Liberties Union, and Texas Civil Liberties Union, by depositing same in the United States Mail.



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